SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 561

JOHNNY C. WILSON, *et al.*, etc.,

Appellants,

—v.—

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia, *et al.*, etc.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

JOHNNY C. WILSON; HOSEA L. WILLIAMS; SAM W. WILLIAMS; FRED C. BENNETT; PHIL WHITUS; LEON DAVIS; SLATER KING; SUZANNE R. and HENRY L. BASS; JODY PALMOUR; RALPH LORENZO MANNINGS, a/k/a WILLIAM H. DUKES; WOODROW STARGELL, individually and as father and next friend of WINSTON STARGELL; a minor, JESSE HILL, JR.; GENE GUERRERO, JR.; and LILLIE BELLE HOLT, individually and as mother and next friend of HALLIE MAE HOLT, a minor; for themselves jointly and severally, and for all others similarly situated,

Appellants,

—v.—

ASA D. KELLEY, JR., Director of the State Board of Corrections of Georgia; JOHN B. STANLEY, STETSON BENNETT, JR., RICHARD W. WATKINS, JR., JACK T. RUTLEDGE, as members of the State Board of Corrections of Georgia; WILLIAM H. BURSON, as Director of the State Department of Family and Children Services of Georgia, and as Chairman of the State Board for Children and Youth; MRS. H. SOL CLARK, G. OTHELL HAND, GUY K. HUTCHERSON, MRS. MAMIE K. TAYLOR, IRVING KALER, BERT STRUBY, MRS. LESTER HARBIN, JACK WILLIAMS, JR., LEWIS STOVER, JR., MRS. HENRY H. PARSONS, C. L. JONES, DAVID HOLMES, HARVEY PASCHAL, MRS. LAMAR RUSSELL, as members of the State Board for Children and Youth; WELLBORN R. ELLIS, as Director of the State Board for

Children and Youth; EDWIN L. SWAIN, as Director of the State Merit System of Personnel Administration; THOMAS H. MILNER, JR., Chairman of the State Personnel Board; L. E. BOWEN, SR., as Vice-Chairman of the State Personnel Board; DR. HUGH A. GOODWIN, as member of the State Personnel Board; T. RALPH GRIMES and LYNWOOD WILLIFORD, as Sheriffs of Fulton County, Georgia, and Mitchell County, Georgia, respectively, and all other sheriffs of Georgia, jointly and severally, who are similarly situated, GEORGIA SHERIFFS' ASSOCIATION, DANIEL E. STRINGER, its President, T. RALPH GRIMES, S. CARL GRIFFIN, DWAYNE GILBERT, W. R. BUSSELL, D. LAMAR STEWART, ALBERT HUDSON, LAMAR MARTIN, HOWARD NORRIS, KERMIT SANDERS, RUSSELL TANNER, ADGER MOORE, as Members of the Board of Directors of the Georgia Sheriffs' Association; LEWIS DAVIS, as Warden of the City Jail of Albany, Georgia, ED FRIEND, as Chief of Police of Albany, Georgia, FRED SINK, as Superintendent of Streets and Public Works of Albany, Georgia, and all other wardens and jailers of Georgia, jointly and severally, who are similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

Opinion Below

The majority and dissenting opinions of the United States District Court for the Northern District of Georgia are not

yet reported. They are set out in the Appendix, pp. 1a-18a.

Jurisdiction

This action was brought under the eighth and thirteenth amendments and the due process and equal protection clauses of the fourteenth amendment of the Constitution of the United States and the following provisions of the United States Code: 18 U. S. C. §§242, 1581, 1584; and 42 U. S. C. §§1981, 1983, 1944, 2000c-2000d-4. Jurisdiction was conferred by 28 U. S. C. §§1331, 1343(3) and (4), 2201, 2281 and 2283; and 42 U. S. C. §§1981, 1983, 1988 (R. 10, 87, 1409).

Plaintiffs[1] brought this class action seeking declaratory and injunctive relief (1) to abolish segregation in all the jails and penal institutions in the state of Georgia, (2) to prevent discrimination in the employment of Negroes at penal institutions and as deputy sheriffs within the state of Georgia, and (3) to abolish all county public works camps in the state of Georgia. A statutory three-judge district court was convened and, by order entered June 27, 1968 (amended by order entered August 14, 1968) Georgia Code §§77-310(a), 77-108, and 77-9904 (set forth in the opinion at Appendix p. 5a) were declared unconstitutional to the extent that they require segregation of the races in the prisons and jails of Georgia, enjoined their enforcement, and set forth a plan for the desegregation of penal facilities in the state of Georgia (R. 1424-

[1] Appellants were plaintiffs in the court below and will be referred to herein as plaintiffs; appellees were defendants below and will be referred to herein as defendants.

25, 1850-51). In its opinion delivered therewith however the court denied relief as to the second and third grounds set forth above, one judge dissenting on the second ground. It is from this denial that plaintiffs appeal by notice of appeal filed in the United States District Court for the Northern District of Georgia on July 26, 1968.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime and Avocado Growers Inc.* v. *Jacobsen,* 362 U. S. 73 (1960) and *Sterling* v. *Constantin,* 287 U. S. 378 (1932).

Questions Presented

1. Whether Negro and white persons incarcerated in penal institutions in the state of Georgia, formerly incarcerated therein, or having proceedings pending against them which may result in such incarceration may maintain a class action to prevent discrimination in the employment of Negroes at penal institutions and as deputy sheriffs within the state of Georgia, and, if so:

(a) Is such discrimination prohibited by the eighth, thirteenth and fourteenth amendments of the Constitution of the United States?

(b) Is a prima facie case of such discrimination made out by a showing of a gross disparity between the percentage of Negro employees in such system and the percentage of eligible Negroes in the population of the state, which disparity is pervasive and longstanding?

(c) Are defendants, which include those who are in control of the state penal institutions, a warden of a county public works camp, two county sheriffs, and two persons in charge of municipal jails and the state sheriffs association, proper class representatives against whom the action can be maintained and against whom class relief can be granted?

2. Whether the maintenance of a system of county public works camps which is in effect a substitution for and continuation of Negro slavery or a badge or vestige thereof, and in which the percentage of Negro inmates is significantly greater than the percentage of Negroes in the penal system, and which is maintained for the economic benefit of the state to the diminution or exclusion of any rehabilitative function can be maintained conformably with the eighth, thirteenth, and fourteenth amendments of the Constitution of the United States.

Statement of the Case

A. The Parties and Proceedings

The named plaintiffs include persons who are presently incarcerated in one county jail, two county public works camps (the defendants Director and State Board of Corrections having discretionary authority to assign prisoners to and to transfer them among these camps, the state prison, and the various other state penal institutions), and the state penal institution for juvenile male offenders. They also include persons who have been incarcerated in the state prison, the state penal institution for female juvenile offenders, three county jails, and four municipal jails, persons who are under federal indictment in the Northern Dis-

trict of Georgia and are therefore subject to detention in the jails and prisons of the state, and a bail bondsman who has been repeatedly called upon to make bail for those jailed due to civil rights or related activity. Nine of the plaintiffs are Negroes and four are white (R. 11-12, 1968, 1972, 1982-84).

The defendants are all public officials concerned with the operation of Georgia's correctional institutions. They include the director and members of the State Board of Corrections, the State Board for Children and Youth, and the State Personnel Board. Two of the defendants are sheriffs, and the Georgia Sheriff's Association and its President and directors were added by amendment. The Warden of a City Jail is a defendant and his Chief of Police and Superintendent of Streets were added by amendment, as was the Warden of a County Public Works Camp. The sheriffs and wardens have been sued as representatives of class defendants, "jointly and severally, who are similarly situated" (R. 13-15, 86-89, 140-41, 1409, 1847-48).

A statutory three-judge court was convened (R. 49), interrogatories were filed, answered, and made a part of the record (R. 1929-30), and a hearing on defendants' motions to dismiss, combined with a partial hearing on the merits, was held on May 14, 1968. Although the ruling granting plaintiffs' prayer for desegregation of the inmates in the penal facilities and denying the remaining prayers for relief was entered based on the state of the record after the hearing, it was ordered at the hearing that the record remain open so that any appeal would be upon a full record (R. 1961-64). The record was accordingly completed after the hearing (R. 2051-2053).

B. The Georgia Correctional System

1. *The Employees and Their Duties*

Of the more than 50 persons employed by the state of Georgia in its correctional system, not more than thirteen are Negroes (the state population is 28.5% Negro (R. 19)); over half of these are at the boys' institution for juvenile offenders; and most of the rest are chaplains, part-time consultants, etc. (R. 1878-81). It was not until February 14, 1967 that the Board of Corrections passed a motion to "authorize [*i.e.* not "require"] the Director to employ custodial officers in the prison system without discrimination to race" (R. 2179), even though in March 1964 substantially all of the employees had been brought under the putatively non-discriminatory Merit System (R. 2199). The Merit System's rules scrupulously caution against "Discriminations due to religious, social or political affiliations" (R. 1487), but make no mention of racial discrimination.

The correctional employees are generally of low educational attainment—average education is 10.5 years for all employees, 10.9 years for wardens and deputies, and 9.6 years for guards. Institute of Government, University of Georgia, *Georgia Probation, Parole and Correctional Personnel, A Demographic Study,* 5 (1967). At least for personnel to be hired after July 1, 1968, higher educational levels (high school for guards and college for wardens) are said to be "desirable" but not mandatory prerequisites (R. 1542-60). There is a severe shortage of employees (*e.g.*, R. 2171).

It is with these correctional employees that the system attempts to rehabilitate those committed to it. Their value in the education of inmates is recognized by the Board of

Corrections in its *Employees Basic Policies, Procedures and Regulations,* 3 (1966) (R. 2057):

> The custodial officer has more contact with the inmates than any other employee or official of the Department. His function is basically restrictive but by his attitude in the performance of his functions he can have a significant effect on the inmates in his charge. A firm but fair attitude will help toward development of respect for and obedience to, the general rules governing the inmate population. *He should bear in mind that in addition to his duties relating to custody and security he has a definite duty to assist in the overall Treatment Program* (emphasis in original).

The necessity for " . . . sufficient qualified personnel to cover all posts to give proper supervision," was recognized in Ragen, *Report and Observations on Inspection of Facilities and Operation of the Georgia Penal System* 81 (1963) (R. 1673) (the *"Ragen Report"*). "This Georgia does not have; therefore, their program is very lacking in accepted prison management standards." *Id.*

Mr. Ragen noted that:

> No thought is given to rehabilitation or preparation of inmates for their return to society even though a great percentage of the prisoners will eventually be released.
>
> It is a recognized fact that the prison guard is the person that is most in contact with the prisoners, and therefore, he is expected to develop within them, a desire to prepare themselves for their return to free society. *Id.*

And,

> . . . he must . . . thoroughly understand that he is not only to guard against the escape of prisoners and to maintain order, but he must also supervise the quantity and quality of the inmates' work. He is expected to act as counselor to inmates in personal matters, consider each inmate as an individual with an individual personality and treat each impartially. If rehabilitation of inmates is to be successful, it would seem he must possess almost every virtue of mankind. It is most important that there be sufficient employees to cover every post; no institution can be operated successfully unless there is sufficient personnel. *Id.* at 76.

For these reasons, and others, recruitment, orientation, and continuous training programs " . . . have become necessary adjuncts to the successful management of reformatories and prisons. The need for such programs, linked closely as they are to the institutional philosophy of correctional treatment, is, however, more acute in some areas than others." *Id.*

Mr. Ragen noted that:

> In larger maximum security prisons especially, no one maintains as close contact with the inmates as the officer on the inmates' assignments. He is the one person who has an opportunity to become thoroughly acquainted with the inmate, to learn the inmate's faults, his virtues, his capabilities, his limitations, etc.
>
> Every successful prison administrator realizes that the result of his program depends on the effectiveness of the personnel. It is the correctional officer who is in the key position to exert the most effective influence

> on the inmate. Therefore, it is most important that the correctional officer be equipped by temperament and training to make the best possible use of his position. *Id.* at 78.

The rehabilitative, educational and correctional aims are also the state's stated legislative and administrative goals. For example:

> In addition to security considerations, it shall be the duty and the responsibility of all correctional personnel to do everything reasonably within their power to insure the reformation and rehabilitation of the individual inmate so that he may return to the community as a useful, law-abiding citizen. *Rules and Regulations Governing the Operations of State Correctional Institutions and County Public Works Camps in the State of Georgia* 15 (1967) (the *"Rules"*).

And "[t]he Department of Corrections is working diligently to build a Correctional System—rather than merely maintaining a prison system." *Board of Corrections Annual Report, July 1, 1964–June 30, 1965,* 3 (R. 1223) (the *"Annual Report, 1965"*).

The *Ragen Report* lamented that "[i]f there were employment and educational programs at Reidsville, the number of men in segregation and isolation could be reduced by 75%. Idle people are troublesome people."[2] *Id.* at 11.

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[2] And they are also unremunerative people. Throughout the *Ragen Report* as in Georgia law the profit motive as a proper concern of penal administration reappears. From praise for the Farm, *Id.* at 16-17, to a proposal for Prison Industries *Id.* at 58-67, profit from convict labor is stressed. As elsewhere pointed out, Georgia's economic concerns exceed those of the rest of America

And since the system should have concerned itself with the education of those confined, the Ragen report concerned itself with the academic, vocational[3] and library failures of Georgia's prisons. *Id.* at 5, 12, 19-22, 32, 34-35, 43, 47-48, 82-94.

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and, it often seems, of even the rest of the south. The emphasis of the *Ragen Report* is on rehabilitative industry which will provide the graduate convict with a job opportunity. Mr. Ragen himself sometimes seemed somewhat nonchalant in his rehabilitative concern ("I find that by using inmates in construction programs . . . the cost of most buildings would be no more than $3.50 per square foot, which, in my opinion, is constructing practical building at a very minimum cost; it is giving employment, which is so important in a prison operation, then too, it is most important to teach inmates some sort of a vocation during their term of confinement. [*sic*]" *Id.* at 46.) Mr. Ragen's views must have fallen on welcome ears for correctional officers ". . . shall also see to it that no inmate is permitted to indulge in idleness or shirk his work assignment due to indifference, favoritism, or laziness." Rules at 43. And, of course, the profit motive remained important to Mr. Ragen who contended that ". . . prison industries can, over a period of years, become self supporting and actually return funds to the State Treasury." *Id.*, 72. "Eventually the value of production . . . should total . . . to $2,500,000 annually and the earnings or profits from operations should be sufficient to substantially off-set their initial cost and return continual dividends to the State—both tangible and most important—in the eventual rehabilitation of the men and women whose lives are reshaped by this constructive effort." *Id.*, 67.

[3] "Books, courses and practical and qualified leadership should be furnished so that a man can learn a trade and become qualified to earn a living in free society. After all, these inmates are saving the State many tax dollars." *Id.* at 34. But *cf.* the testimony of a prisoner:

> Q. Did you take any books there [to the county work camp] with you? A. Yes, sir.
>
> Q. What kind? Do you remember the names, the titles of them? A. I think one was "Man-Child and the Promised Land".
>
> Q. That by Claude Brown? A. Right. "Very Hot Summer," and "The Adventure of Negroes."
>
> Q. What happened to those books? A. They tuck them from me (R. 1991-92).

"There are no educational programs in any of the [county] camps, and without education, improvement cannot be hoped for," said the *Ragen Report*. "An academic and vocational program should be established." *Id.* at 26.

Currently the eight hour day is said to be " . . . mandatory in order that there might be sufficient hours left for education, training, recreation and rehabilitation programs for the inmates." *Rules* 22.

Nor could it be said that educational facilities are not needed—of 3238 felons committed in fiscal 1965, 2618 were designated as "laborers (common)," out of a total of 54 possible categories. *1965 Annual Report* 76.

The Department has termed the *Ragen Report* "something of a bible for reforms" *Annual Report, 1966,* 11. And "education and training" were continued as " . . . the foundation on which the Director's 'New Concept of Correctional Administration' is based."

Indeed the prime mission of the prison industries program was said to be not state profit but inmate rehabilitation.[4] *Id.* at 22.

Thus, with a large number of Negro convicts (56%), with knowledge that "[n]o prison or camp can be successfully operated without an employee at each assignment and post" *id.*, 5, the State has failed or refused to recruit and employ Negroes. Nor have the counties hired significant numbers of Negroes (R. 1551-81, 1969, 1974, 1984).

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[4] Regardless of the aim of the State, it provides a niggardly amount for its correctional institutions. Citing 1962 Georgia cost per inmate of $540.20 and cost per inmate for the year ended June 30, 1966, as $740.75 the Department said: "The national average in 1962 was $1,440.00 and therefore you can visualize how far below the standard we were." *Id.* at 25.

2. *The History of the Georgia Correctional System*

Plaintiffs' case, particularly on the thirteenth amendment question, relies heavily on the historical development of the Georgia Prison System from the pre-Civil War days of traditional slavery to the present time. Accordingly a more wide-ranging statement than is customary is presented in order to develop plaintiffs' contention that the county Public Works Camps are slavery or the badges and vestiges of slavery.

a. *Slavery: Its Transference to the Penal System.*

Georgia entered the Civil War with an all-white prison population of about 200. See E. M. Coulter, *Georgia, A Short History,* 292-94 (1933). But the freeing of the slaves changed the nature of the system; Negroes came to outnumber white prisoners by "nine to one of the male sex and about forty to one among the females." Bynum, A Brief History of the Penal System of Georgia, 12 (unpublished W. P. A. text, University of Georgia, 1950). "This was about average for the period from 1866-1909." *Id.,* n. 1. As the "Principal Keeper" for the year 1876 said, "[t]he negro of the times, in having freedom and political rights conferred upon him, seems to have become also invested with the privilege of the penitentiary." E. M. Coulter, *James Monroe Smith: Georgia Planter,* 67 (1961). Although a per se Black Code was not adopted, "[v]agrancy, apprentice, and enticement laws were also passed on a non-color basis. . . ." Conway, *The Reconstruction of Georgia,* 56 (1966). But, as the author points out, enforcement was on a color basis. *Id. Cf.* Cash, *The Mind of the South,* 419-22 (1941) on the use of vagrancy laws to get labor to harvest the 1937 bumper crop of cotton.

The major revolution of reconstruction was in agriculture where the slave had been as valuable (and important) as the land. E. M. Coulter, *Georgia, A Short History,* 349 (1933). "Dissolution stared planters in the face at the end of the war. Without the labor of their former slaves they were lost." *Id.,* 350.

The South saw, however, that with some changes in nomenclature, slavery might be perpetuated:

> The southern states expected no further federal intervention after the ratification of the Thirteenth Amendment:
>
> > [M]ost of them intended to replace slavery with a caste system that would keep Negroes perpetually subordinate to the whites. Negroes were to remain a dependent laboring class; they were to be governed by a separate code of laws; they were to play no active part in the South's political life; and they were to be segregated socially.
>
> Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387, 390 n. 7 (1967), quoting Stampp, *The Era of Reconstruction* 14 (1965).
>
> By 1877 the political future of the southern Negro was in the hands of the "redeemers" who had regained control of all the southern states. Kinoy, *supra* at 406 n. 56.

In 1866 the Legislature authorized the Governor, by Act, to "farm out the convicts." Bynum, *supra* at 14. Penal slavery substituted rather cheaply for previous conditions of servitude.[5] "The entire penitentiary was leased to Grant,

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[5] The proclamation to free niggers had really only reduced prices for niggers. White trash who never had a thousand

Alexander and Company, a construction company engaged largely in railroad building, on June 28, 1869. . . . By January 1, 1870, the company had 393 convicts in their possession." Taylor, *The Origin and Development of the Convict Lease System in Georgia*, 26 *Ga. Hist. Quar.* 113, 114 (1942). And, by 1875 ". . . instead of becoming a liability, the penitentiary had become a source of income." *Id.*, 118.

Colonel Smith, one of the lessees "would remark to county officials, 'you had better send me some more niggers or I will come down and take the courthouse away from

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dollars or fifteen hundred dollars to pay for a slave could get niggers now for a few dollars a head by giving them an advance against wages.

Times change and new ways of getting slaves are cunningly devised. Burns, *Georgia Nigger* 138-39 (1932).

Cf. E. M. Coulter, *Georgia, A Short History* 274 (1933):

The plantation was an economic organization and a business enterprise; it was not set up as a sentiment to afford backgrounds for songs and stories, nor was it contrived by fiends to be a torture chamber in which the noble black man of Africa should be made to suffer.

In the eyes of some, the plantation slavery was less obnoxious than its successor:

[A] southern man said: "Before the War we owned the negroes. If a man had a good negro, he could afford to take care of him; if he was sick, get a doctor. He might even get gold plugs in his teeth. But these convicts: we don't own 'em. One dies, get another." Such an attitude naturally resulted in cruel and inhuman treatment of the convicts. *Zimmerman*, Penal Systems and Penal Reform in the South Since the Civil War (1947, unpublished dissertation in the University of North Carolina Library), citing National Conference of Charities and Corrections, *Miscellaneous Reports* (1883), 16, Pamphlet Collection, New York Public Library, Vol. LXI, No. 7.

For a concise scholarly development of the social, political, and economic indicia of slavery, see Green, *Some Aspects of the Convict Lease System in the Southern States* in GREEN (ed.), ESSAYS IN SOUTHERN HISTORY 112-23 (1949).

you.'" E. M. Coulter, *James Monroe Smith: Georgia Planter,* 67 (1961). The February, 1967 minutes of the defendant Board of Corrections records the message in more sedate language; *e.g.;* the director "explained to the County Commissioners . . . the great scarcity of prisoners throughout the system . . . however . . . every effort would be made to build up a quota for Troup County of at least forty-five inmates" (R. 2175). Earlier the minutes reflect that the Executive Director of the Georgia Association of County Commissioners had "request[ed] . . . the lowering of security risk standards on prisoners in order for more counties to secure additional prisoners" (R. 2183).

By 1897 Colonel Smith who had used his convict labor across Georgia and on his own plantation had become a convict trader:[6] "In fact, he [then] bought 100 convicts each at $102 a year for five years and sold them for $174, making an annual profit of $72 on each convict." *Id.* at 78.

b. *From the Convict Lease to the Chain Gang.*

In 1909 the convict lease was abolished and the chain gang county work camp became the instrumentality for the perpetuation of black slavery. Although there had been numerous attacks on the system,[7] the reasons for the change

[6] Even in discussion of values the language of the slave trader was used, as it still is today; the Board of Correction minutes make numerous references to leasing and hiring out prisoners to various public agencies (*e.g.* R. 2194).

[7] There have been a plethora of latter-day commission studies and reports deploring Georgia's prison system and the County Public Works camps in particular. Several of these are in the Record at (R. 1613, 1632, 1673). Zimmerman, Penal Systems and Penal Reform in the South Since the Civil War, *supra,* at 186-89, 424-33 chronicles the almost total ineffectiveness of attempts at reform through the first half of the 20th century.

seem more economic than moral. See Taylor, *The Abolition of the Convict Lease System In Georgia,* 26 *Ga. Hist. Quar.* 273 (1942).

As the reformers' campaign gained support, the Good Roads Associations were waiting in the wings. The economic need created by the automobile would perpetuate slavery as surely as had Mr. Whitney's cotton gin. *Id.* at 278. See *id.* at 285-87. The shot-gun marriage of penal slave labor to the public roads finally and—in practical effect—permanently linked the chain of modern Negro bondage. For:

> When the opportunity was given, the counties took all of the able-bodied [prisoners] that were available and have used them continuously until the present time. The plan has proven to be a success. The counties have provided equipment for housing, feeding, guarding, and working them in a manner that has resulted in great benefit to the convicts themselves, as compared with their former health and treatment under the Lease System . . . . An inspection of the different road camps throughout the State shows them to be in excellent physical condition.[8] Convict labor in road construction has, in general, proven more reliable and satisfactory than that of hired day labor. *First Annual Report of the Highway Department of Georgia,* 57 (1919).

Of the drive to tie convicts to roads, Bynum, generally an apologist, notes that in the years prior to 1909: "The good roads movement was fast becoming a vital issue.

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[8] But not in the 1960's. See Plaintiffs' Exhibits 1-13, introduced at the hearing.

Debate centered around the question of the feasibility of free labor for road building as compared with convict labor." Bynum, *A Brief History of the Penal System of Georgia, supra* at 56. By 1916 with the creation of the Highway Commission "[t]he two ideas of good roads and convict labor . . . seemed to coalesce." *Id.* at 64. "Good roads had become a matter of more importance than revenue from the hire of convicts." *Id.* at 62. The changeover at least had the advantage of removing the appearance of using prisoners for private profit. Today the working of prisoners on private property is verboten, yet somehow it is a recurrent problem (R. 2173; see, *e.g.*, R. 2163-66).

3. *The Physical Facts Concerning the System*

Gibson, *A General Overview of Parole, Probation and Penal Administration in Georgia* (1964) (R. 1632) states:

> Georgia, at the present time, has far too many institutions of incarceration. In a survey conducted during the course of this investigation, it was found that the average state in this country has about eight institutions in its prison system; Georgia has ninety-five. While this State has an inordinately large number of felony prisoners for its population (over twice the national average) it is hardly necessary to house those prisoners in ninety-five different institutions.
>
> Of the ninety-five institutions mentioned above, seventy-five, or more than three-fourths, are county-maintained public works camps. These camps have two major purposes: (1) to perform work on public projects in the county (highways, drainage ditches, etc.); and (2) to act as places of incarceration for county and State prisoners. Since the camps do act as public works departments for the county, longer-

term felony prisoners are more desirable than the short-term misdemeanant.[9] *Id.* at 72-73.

Because of the exaggerated number of institutions that exist in the State, a number that includes institutions housing less than forty prisoners, there is, for all practical purposes, a total lack of vocational training programs created and administered in such a way as to turn back to society a product different from and better than the product which entered the State prison system.

The lack of psychiatric services available to the Georgia prison system can only be classified as inexcusable in a modern state.

The further lack of any specialized institution for the treatment of drug addicts and alcoholics must also be labelled as inexcusable.

The space given to corrections in this report, a report which should be devoted more explicitly to parole, is justified because of the fact that no parole system can be better than the corrections department that produces those inmates who become eligible for parole consideration. *Id.* at 75-76.

An enumeration of the shortcomings of the Georgia correction process and the Corrections Department to which convicted individuals are sent consists of an exaggerated number of small, inefficient operations with neither the staff nor the resources to carry on any type of rehabilitative program. The most essential elements of a modern corrections system are almost completely lacking. . . . There are approximately

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[9] The Board's minutes confirm the economic value of work camp inmates (R. 2175-77, 2183, 2189, 2193-95, 2201, 2203, 2205-06).

two and one-half times as many prisoners incarcerated in the State prison system than this State normally should anticipate under the national standards and averages. *Id.* at 109-110.

In fiscal 1966, forty of the seventy-five county Public Works Camps were racially exclusive as were thirteen of the fourteen state camps. There was a total of 2579 white prisoners and 3106 Negro prisoners. *1966 Annual Report* 72-74, 77. Only two of the county camps were all white; all but two of the fourteen state camps were all white. *Id.* Even considering the figures for camps in which prisoners of both races are confined (most of these show an overwhelming preponderance of prisoners of one race) it is clear that the county camps (those attacked herein as being vestiges of slavery) are preponderantly Negro. *Id.*

The Questions Are Substantial

A. Employment

The following seems painfully clear: Georgia's penal and correctional employment, sheriffs offices, and deputy sheriffs employment are reserved, "white only" jobs.[10] Many of the white men and women who hold these jobs lack education. Significantly these white people are charged

[10] The white man's system of justice has long rankled and been a cause of Negro dissatisfaction with the administration of justice. The Report of the National Commission on Crime and Disorder, 7-8 (1968) noted: "Although specific grievances varied from city to city, at least 12 deeply held grievances can be identified and ranked into three levels of relative intensity. . . . 1. Police practices, 2. Unemployment and underemployment . . . 6. Ineffectiveness of the political structure and grievance mechanisms, 7. Disrespectful white attitudes, 8. Discriminatory administration of justice . . . ."

with the primary duty of educating and rehabilitating a prison population which is 56 per cent black. And the prison system (including its facilities for youthful offenders) does have an educational function.

In education:

> It is no longer open to question that faculty and staff desegregation is an integral part of any public school desegregation plan—not because of teachers' employment rights, but because students are entitled to a nonracial education, and assignment of teachers to students on the basis of race denies students that right. *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 472 (1967), *aff'd mem. sub nom. Wallace* v. *United States,* 389 U. S. 215 (1967) (citations omitted).

Regarding teacher integration see also, *United States* v. *Jefferson County Bd. of Educ.,* 372 F. 2d 836, 883-86 (1966), *aff'd on reh. en banc* 380 F. 2d 383 (5th Cir.), *cert. denied* 389 U. S. 840 (1967); Note, *Desegregation of Public School Facilities,* 51 Iowa L. Rev. 681 (1966) (as quoted in Emerson, Haber and Dorson, Political and Civil Rights in the United States, 1715-22 (1967)).

> The only successful judicial attacks on racially assigned faculties have occurred in suits brought by Negro school children. These attacks are usually collateral to the main issue of student desegregation. It is clear from the results of the reported decisions that Negro children have standing to raise the question of segregated faculties . . . . The courts are rarely explicit in explaining which reason underlies their granting of standing. When the question has been dis-

> cussed, standing has been said to result from a violation of a right belonging to the pupils themselves. This right, to be free from racial discrimination in the selection of the faculty which is to teach them, is held to be a part of the broad right of the pupils to have an education free from any consideration of race.
>
> There is ample authority to show that Negro pupils are in fact injured by the practice of assigning teachers to schools on the basis of the teachers' or the students' race. Existing information would seem to show that segregated faculties are harmful to the educational and psychological development of Negro children. *Id.* at 1718 (citations omitted).

Nor does it matter that the institutions here involved are penal as well as educational in nature. *Cf. Arkansas Training School for Boys* v. *George*, 377 F. 2d 228 (8th Cir. 1967); *Singleton* v. *Board of Commissioners*, 356 F. 2d 771 (5th Cir. 1966).

Even though Congress failed to cover state employment in Title VII of the Civil Rights Act of 1964 the existence of a judicial remedy is clear. In 1965 the United States Commission of Civil Rights in *Law Enforcement, A Report On Equal Protection In The South*, 180, said:

> In order to help assure that justice is administered in a non-discriminatory manner, employment in law enforcement agencies should be available to all persons, regardless of race, color, religion, or national origin. Title VII of the Civil Rights Act of 1964, providing for equal employment opportunities, does not cover public employment. Although discrimination in public employment can be challenged in private law

> suits, administrative and judicial remedies also should be provided. The Commission recommends that Congress consider amending Title VII to extend its coverage to public employment.

Since Congress did not amend Title VII, the courts should be particularly solicitous toward these "private law suits"; in fact the availability of the private remedy is the only fair rationalization for the omission from Title VII of state employment. Yet the majority of the district court erects barriers which, legally, are overly technical, and, as a practical matter, tend to make the right illusory.

It would seem inconceivable that the right to be free from discrimination in employment by states and counties would not be guaranteed by the fourteenth amendment. Surprisingly, however, this appears to be a case of first impression on the point. As noted by the court below, "the status of the question is not clear and we find no definitive opinion on the subject" (10a). Probably the reason for paucity of authority is that the answer is too obvious to have engendered reported litigation. Thus the lower court's error in this respect is so egregious as to call for correction by this court.[11]

Furthermore, the court's denial of statewide class relief against the defendants sows the seeds of another decade of legal battles similar to that following *Brown* v. *Board of Education,* 347 U. S. 483 (1954). We have learned from

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[11] The ruling is also, at least in principle, in conflict with a more recent order denying, without reaching the constitutional issue, defendants' motion to dismiss in a suit brought by the United States government challenging racial discrimination in the employment practices of seven Alabama state agencies. *United States* v. *Frazer,* Civil Action No. 2709-N (M. D. Ala., order entered August 16, 1968).

over a decade of "with all deliberate speed" that in order to combat racial discrimination we must proceed on a statewide rather than an individual basis.

It has been recognized in many instances that, in order to remedy past racial discrimination, a positive effort must be made to provide Negroes with the rights and opportunities previously denied them. "[T]he Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination." *United States* v. *Jefferson County Bd. of Educ., supra,* 372 F. 2d at 876. Negroes may have to be sought out purposely to be placed on jury lists. *Brooks* v. *Beto,* 366 F. 2d 1 (5th Cir.), *cert. denied,* 386 U. S. 975 (1966). It may be necessary to relax voter qualifications in order to equalize the opportunity of Negroes and whites to register to vote. *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966).[12]

Common sense, experience, and judicial precedent suggest that a gross discrepancy between Negroes available for employment in prisons and as deputy sheriffs and the actual number of Negroes holding such positions raises an inference that Negroes have in fact been excluded from consideration for these jobs.

The proof of systematic exclusion here is clear and convincing. In *United States* v. *Jefferson County Bd. of Educ., supra,* 372 F. 2d at 887, the court said:

> This Court has frequently relied on percentages in jury exclusion cases. Where the percentages of Negroes on the jury and jury venires is disproportionately low

[12] But here, because of the obviously low educational qualifications required of Georgia's presently employed personnel a relaxation of educational qualifications may prove unnecessary.

> compared with the Negro population of a county, a prima facie case is made for deliberate discrimination against Negroes [footnote omitted]. Percentages have been used in other civil rights cases [footnote omitted]. A similar inference may be drawn in school desegregation cases, when the number of Negroes attending school with white children is manifestly out of line with the ratio of Negro school children to white school children in public schools.

See *United States* v. *Ward,* 349 F. 2d 795, 803 (5th Cir. 1965), where the court compared the number of Negroes registered with the number of Negroes eligible to vote. See also *Whitus* v. *Georgia,* 385 U. S. 545, 552, n. 2 (1967), citing Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases,* 80 HARV. L. REV. 338 (1966); *Brown* v. *Allen,* 344 U. S. 443, 473 (1953); *Smith* v. *Texas,* 311 U. S. 128, 130-131 (1940).

B. The County Public Works Camps

1. *The Thirteenth Amendment*

As shown by the history[13] of the Georgia penal system, the racial distribution within the system,[14] measured by

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[13] See MORGAN, BASIC PROBLEM OF EVIDENCE 360 (1962): " . . . in most instances the historical fact is a subject of judicial notice." For a number of years this has been the rule in the Fifth Circuit. See *United States ex rel. Goldsby* v. *Harpole,* 263 F. 2d 71; 82 (5th Cir.), *cert. denied* 361 U. S. 838 (1959) (" . . . it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."); *Meredith* v. *Fair,* 298 F. 2d 696, 701, *cert. denied* 371 U. S. 828 (1962); *United States ex rel. Seals* v. *Wiman,* 304 F. 2d 53 (5th Cir. 1962), *cert. denied* 372 U. S. 915 and 924 (1963). Here, as in *Seals,* the discrimination is "long continued," 304 F. 2d at 67. Regarding the effect of a history of discriminatory practices, see *Patton* v. *Mississippi,* 332

contemporary standards, the convict laborer stands in the same relationship vis-à-vis his master as he has throughout the history of the system. His treatment today falls just as far short of that dictated by common human decency as ever. Present day observers report in language less archaic but no less outraged. (See Pl. Exhs. 1, 2 and accompanying testimony, R. 2004-14, 2020-28.)[15]

Mr. Ragen was critical of all county prison camps. *Ragen Report,* 24-27. Yet the defendant Director of Corrections' six-phase "Blueprint for Progress," "a blueprint on which to build a real correctional system" (R. 1619) "the most comprehensive plan ever presented for real prison reform in Georgia" (R. 1625, 1630) made no men-

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U. S. 463, 468-69 (1947); *United States* v. *Mississippi,* 380 U. S. 128, 143, 144 (1965).

Unfortunately, we often " . . . need education in the obvious more than investigation of the obscure." Holmes, *Law and the Court,* in *Collected Legal Papers* 291, 292-93 (1921). "The plaintiffs here only want 'for the Court to see what "[a]ll others can see and understand * * *"' *United States* v. *Mississippi* (S. D. Miss., 1964), 229 F. Supp. 925, 998 (dissenting opinion) reversed, 1965, 380 U. S. 128 . . . ." *Hamer* v. *Campbell,* 358 F. 2d 215, 220 (5th Cir. 1966).

[14] The district court's statement that "the action of this court in ordering desegregation of the penal institutions in all respects does much to answer the complaints raised about custodial practices" (11a) does not meet the issue because the desegregation order does not change the fact that the county camps, those attacked under the thirteenth amendment, are presently predominantly Negro.

[15] Q. Now, Mr. Pennington, would you please state for the Court what you found upon investigating the County Work Camps? A. I came to the conclusion that the State Prisoner assigned to a County Work Camp served, basically, the function of a mule. He was traded to the State for his bed and beans in return for his labor (R. 2005).

tion of abolition of work camps or even of a shift in their focus.

It was perhaps logical, but not constitutional, that with the demise of rugged individualism and the increase in governmental involvement in economic matters, the states and counties should step into the shoes of their lessees and reap the economic benefits for their own projects. Where else could they obtain a laborer for only the cost of the bare minimum in food and shelter plus supervision expense, a fraction of the going value for labor? This Court, in the various cases abolishing peonage[16] and declaring that the thirteenth amendment was designed "not merely to end slavery but to maintain a system of completely free and voluntary labor . . . ," *Pollock* v. *Williams*, 322 U. S. 4, 17 (1944), could not have intended that the state become the slave master.

The substantiality of the thirteenth amendment question is pointed up by Judge Tuttle's concurrence on this point being premised on the "present state of the law." But this is an expanding area of the law—since the hearing herein this court has breathed new life into the thirteenth amendment in *Jones* v. *Alfred H. Mayer Co.*, 88 S. Ct. 2186 (1968), and the Virginia Supreme Court has given the thirteenth amendment precedence over the fourteenth in striking down statutes authorizing imprisonment for nonpayment of costs in criminal cases, *Wright* v. *Matthews*, 37 U. S. L. W. 2156 (Va., No. 6974, Sept. 6, 1968).[17]

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[16] *E.g.*, *Pollock* v. *Williams*, 322 U. S. 4 (1944); *Taylor* v. *Georgia*, 315 U. S. 25 (1942); *Bailey* v. *Alabama*, 219 U. S. 219 (1911); see Shapiro, *Involuntary Servitude: The Need for a More Flexible Approach*, 19 RUTGERS L. REV. 65 (1964).

[17] The court's reasoning was parallel to that asserted here: costs "are not part of his punishment for the crime," 37 U. S. L. W. at

Plaintiffs do not lose sight of the fact that the thirteenth amendment allows "involuntary servitude", (but not "slavery") "as a punishment for crime." But the Georgia work camp system is in fact slavery. It was clearly so after reconstruction, and through an unbroken line of succession remains so today. *Cf.* Kinoy, *The Constitutional Right of Negro Freedom,* 21 RUTGERS L. REV. 387 (1965).

> In one sense the deep dividing issue [in 1883] was whether the Court, and more significantly the nation, was prepared to face the reality of the developing situation, a reality Mr. Justice Douglas recently described as the substitution of the Black Codes for the overt system of slavery and the subsequent substitution of racial segregation for the overt system of the Black Codes. *Id.* at 410-11 citing *Bell* v. *Maryland,* 378 U. S. 226, 247-48 (1964).

Kinoy repeatedly emphasizes the necessity for eliminating the badges and indicia of slavery. See particularly *id.* at 407-11. Compare the words of Judge Wisdom:

> *Brown*'s broad meaning, its important meaning, is its revitalization of the national constitutional right the Thirteenth, Fourteenth, and Fifteenth Amendments created in favor of Negroes. This is the right of Negroes to *national* citizenship, their right as a class to share the privileges and immunities only white citizens had enjoyed as a class. *Brown* erased *Dred Scott,*

2156, therefore the imprisonment "contravenes the Thirteenth Amendment" (page 5 of typewritten opinion); here labor solely for the economic benefit of the state (as opposed to that for the purpose of rehabilitation or incidental to maintenance of the confinement facilities) is likewise not for the purpose of "punishment for the crime."

> used the Fourteenth Amendment to breathe life into the Thirteenth, and wrote the Declaration of Independence into the Constitution. Freedmen are free men . . . free of any compulsion that Negroes wear a badge of slavery . . . As Justice Harlan clearly saw in the Civil Rights Cases (1883), 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, *the Wartime Amendments created an affirmative duty that the States eradicate all relics, "badges and indicia of slavery" lest Negroes as a race sink back into "second-class" citizenship. United States* v. *Jefferson County Bd. of Educ., supra* 372 F. 2d at 872-73 (emphasis in original).

Since most of the county work camp prisoners are Negroes, and Georgia law has heretofore required the racial designation and segregation of prisoners, the system itself today, by its geographical and organizational nature, and historically has provided the opportunity to discriminate, condemned by *Whitus* v. *Georgia,* 385 U. S. 545 (1967).

The importance of non-discrimination is implicit in the sanction of the Board of Corrections in its *Policies,* at 8 (R. 2062), to:

> Never resort to calling an inmate by a nickname or by any slang title which indicate his nationality or some personal peculiarity, such as "Dago," "Kid," "Dutch," "Flat Head," etc.[18] Call him by his right name, preferably his surname.

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[18] Although the specific sanction against the use of the word "Kid" may include "Boy" the *Employees Basic Policies, Proceedings and Regulations* do not mention terms such as "nigger" which, in the light of racial statistics and Georgia history seems applicable here. See Burns, *Georgia Nigger* (1932). The Rules provide that the use of " . . . degrading language by personnel or inmates . . . is strictly prohibited." *Rules,* 20. In fact, the matter of degrading

Prisoners are not merely out of sight. Their complaints are also kept out of the public mind. Their letters are censored and those " . . . which contain information or statements known to be untrue, or not in accordance with known facts, will be disapproved and rejected." *Rules,* 18. They may not mention "[n]ames of other inmates . . . and derogatory or abusive remarks about the personnel or critical remarks about the institution and administration should not be made." Nor can they " . . . write detailed information or descriptive data regarding the institution or its operation." *Id.* "Letters containing . . . objectionable matters, will be rejected." *Id.* at 19. Uncensored letters may be mailed to the Governor and prison and parole officials. *Id.* The Warden and all correctional personnel are also " . . . to prevent unauthorized outside contacts . . . " *Id.* at 36.[19]

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terminology appears as yet another example of the practice of observing laudable written statements only in their breach—specifically forbidden terms are "Chain Gang," "Cap" or "Cap'n," "Boss" or "Boss Man" and " . . . in addressing inmates personally the last name only shall be used; no nicknames and no degrading or humiliating jargon." *Id.;* but *cf.*:

> Q. Now, you testified earlier that you were told [by in April 1968] to refer to people as 'Cap'n' and 'Boss'. A. Yes, sir.
>
> Q. How do the Guards refer to you? A. Well, they call you 'Nigger', they call you 'Boy', and they call old peoples 'Uncle' (R. 1991).

Perhaps the use of the abbreviation "etc." was intended to include this term. "Etc." is also, apparently, used in the texts and contexts to cover racial meanings. See, *e.g., Ragen Report*: "Politics, religion, nationality, *etc.*, have no part in any promotion—only efficiency and ability." (Emphasis added.)

[19] "Another factor in the apathy of the people was the fact that the . . . evils of leasing were hidden from public view . . . Hence the masses of people were actually unaware of the evil conditions that obtained." Green, *supra* at 123 (discussing the convict lease system).

Prisoners have not merely been screened from public view; their rights within the prison (as opposed to the events which brought them there) have not been brought before the courts.[20] The benefit of the equal protection clause was not sought by and granted to Negro prisoners in this Court until last term. *Lee* v. *Washington,* 390 U. S. 333 (1968), *aff'g* 236 F. Supp. 327 (M. D. Ala. 1967). Since then, though, judicial interest in the rights of prisoners has been expanding. See, *e.g., Jackson* v. *Godwin,* 3 Cr. L. Rep. 2389 (5th Cir., July 23, 1968); *Mason* v. *Peyton,* No. 5611-R (E. D. Va., Aug. 13, 1968) (order specifying detailed rights of prisoners); *Cupp* v. *Swenson,* 3 Cr. L. Rep. 2391 (W. D. Mo., July 16, 1968); *Burns* v. *Swenson,* 3 Cr. L. Rep. 3233 (W. D. Mo., July 15, 1968).

2. *The Eighth and Fourteenth Amendments*

The facts and principles referred to in the foregoing discussion are equally at home in a discussion of the eighth and fourteenth amendments.

The present practices here attacked must seem no less outrageous to the contemporary observer than those revealed in Spivak, *Georgia Nigger* (1932) or Burns, *I Am a Fugitive from a Georgia Chain Gang* (1932) seemed from the vantage point of the early thirties; only the more spectacular atrocities have been removed. The eighth amendment " . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States,* 217 U. S. 349, 378 (1910). It "must draw its meaning from the evolving standards

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[20] In the relatively few cases in which they have, the efficacy of the remedy has been mitigated by "the long-standing policy of the courts not to interfere in prison administration or discipline at any level" (Opinion below at 11a).

of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958).

When a penal system, or a part thereof is operated in every essential respect contrary to the dictates of modern penology, as well as common-sense notions of rehabilitation, the "evolving standards of decency" have been offended. Georgia has for more than a century proven itself to be impervious to pleas for abolition of a penal system which was a continuation of slavery; it is a vestige and badge of slavery.[21]

Insofar as badges and indicia of slavery are concerned, the three post-Civil War amendments are inseparable. They are a declaration of national policy "to wipe out the status of racial 'inferiority' codified in *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1856)" Kinoy, *supra* at 391. See *Jones* v. *Alfred H. Mayer Co.*, 88 S. Ct. 2186 (1968); *United States* v. *Jefferson County Bd. of Educ.*, *supra* 372 F. 2d at 872-73. No argument made herein under the thirteenth amendment is without support in the language and intent of the fourteenth guaranteeing full national citizenship with all of its privileges and immunities, including due process and equal protection of the laws.

For example, to require one citizen to labor for the economic benefit of the citizens of a county, or of the state, because he has been convicted of crime somewhere in the state is an irrational classification. And when it is noted that he will most probably labor in a county work camp

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[21] *Cf. Baker* v. *Carr*, 369 U. S. 186 (1962) and *Reynolds* v. *Sims*, 377 U. S. 533 (1964) where the Federal Courts invoked jurisdiction to rectify voter wrongs existing since 1901 in Tennessee and Alabama finally ordered state legislatures reapportioned on a one-man, one-vote basis.

only if he is a Negro, the classification becomes all the more invidious.

The district court's ruling overlooks another significant equal protection question—the predominantly Negro population of the county camps, not having educational or vocational programs, are deprived of the opportunity to have the same education as the white inmates of the better equipped state institutions.

The fourteenth amendment does apply to prisoners, *Lee* v. *Washington,* 290 U. S. 333 (1968), and due process of law must extend throughout the legal process; due process must entitle the prisoner to a system truly designed for rehabilitation, or, as Georgia itself terms it, "correction."

CONCLUSION

This case presents substantial federal questions of the rights of inmates of penal institutions under the eighth, thirteenth, and fourteenth amendments. Consideration and resolution of these questions merit plenary briefing and argument before the Court.

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APPENDIX